Editor's note: 86 I.D. 538; Overruled in part -- See Hugh B. Fate, Jr., 86 IBLA 215 (April 30, 1985)

R. GAIL TIBBETTS ET AL.

IBLA 78-646 Decided October 5, 1979

Appeal from three decisions of the Utah State Office, Bureau of Land Management, declaring various lode mining claims null and void ab initio. AD 49-78, 50-78, and 51-78.

Affirmed in part, set aside and hearing ordered in part.

1. Mining Claims: Generally -- Mining Claims: Determination of Validity -- Mining Claims: Location -- Mining Claims: Relocation -- Mining Claims: Withdrawn Land

   For the purpose of Departmental adjudication, an amended location is one made in furtherance of an earlier valid location, while a relocation is one which is adverse to the prior location.

2. Mining Claims: Generally -- Mining Claims: Determination of Validity -- Mining Claims: Location -- Mining Claims: Relocation -- Mining Claims: Withdrawn Land

   An amended location notice generally relates back, where no adverse rights have intervened, to the date of the original location. To the extent, however, that an

amended location merely furthers rights acquired by a valid subsisting location and does not embrace additional or new land, withdrawal of land subject to existing rights will not prevent the amended location from relating back to the original location.

3. Federal Land Policy and Management Act of 1976: Recordation of Mining Claims and Abandonment -- Mining Claims: Generally -- Mining Claims: Determination of Validity -- Mining Claims: Location -- Mining Claims: Recordation -- Mining Claims: Relocation -- Mining Claims: Withdrawn Land -- National Park Service: Generally

   Since an amended notice merges with the original notice, the filing of the amended notice, for purposes of recordation under either sec. 8 of the Mining in the Parks Act, 90 Stat. 1342, 1343, 16 U.S.C. § 1907 (1976), or sec. 314 of the Federal Land Policy and Management Act of 1976, 90 Stat. 2744, 2769, 43 U.S.C. § 1744 (1976), together with such other information required by the applicable regulations, constitutes compliance with the recording requirements of those Acts.

4. Mining Claims: Generally -- Mining Claims: Determination of Validity -- Mining Claims: Location -- Mining Claims: Relocation -- Mining Claims: Withdrawn Land

   Except for claims held under 30 U.S.C. § 38, a failure to record a mining claim as required by state law, coupled with a withdrawal of the land prior to any curative action, invalidates the claim, and thus precludes subsequent amendment of the claim.

5. Mining Claims: Generally -- Mining Claims: Determination of Validity -- Mining Claims: Location -- Mining Claims: Relocation -- Mining Claims: Withdrawn Land

   An oral transfer of a mining claim, though contrary to the statute of frauds, will not serve to invalidate the claim, and a person subsequently seeking to record the claim will be afforded the opportunity to prove that the transfer actually occurred.

6. Mining Claims: Generally -- Mining Claims: Determination of Validity -- Mining Claims: Location -- Mining Claims: Relocation -- Mining Claims: Withdrawn Land

   Where there are factual questions relating to whether action taken subsequent to a withdrawal is in the nature of an amendment or whether it constitutes a relocation, the mineral claimant will be granted the opportunity to show that the subsequent action was a permissible amendment.

APPEARANCES: R. Gail Tibbetts and Ray Tibbetts, pro sese.

OPINION BY ADMINISTRATIVE JUDGE BURSKI

R. Gail Tibbetts appeals from three decisions of the Utah State Office, Bureau of Land Management (BLM), each dated August 28, 1978, declaring various lode mining claims null and void ab initio. 1/ Ray Tibbetts appeals from one of these decisions, AD-51-78. The State

1/ The specific claims involved are set out subsequently in the text of this opinion.

Office decisions recited that the various groups of claims had been located on March 3, 1974, May 20, 1974, and February 1, 1975. The decisions noted, however, that the claims were located upon land which had been included in the Glen Canyon National Recreation Area by the Act of October 27, 1972, P.L. 92-593, 86 Stat. 1311, and had been placed under the administration of the National Park Service. The decisions also noted that the Act had withdrawn the land from location, entry, and patent under the mining laws.

The State Office held that since the claims were located after the passage of the Act withdrawing the land, the claims were null and void ab initio. The decisions recognized appellants' assertion that the locations were meant to be amended locations of earlier claims, but pointed out that nothing on the various location notices indicated that they were amendatory to prior locations.

[1] While a number of departmental, federal, and state court decisions have attempted to draw a distinction between relocation of a former claim and an amended location of such a claim, it is clear that nothing approaching uniformity has resulted. This confusion is understandable since it finds its germination in the 1872 Mining Act, itself. Section 5 of the Mining Act, as amended, 30 U.S.C. § 28 (1976) contains the only reference to relocation:

> On each claim located after the 10th day of May 1872, and until a patent has issued therefor, not less than $100 worth of labor shall be performed or improvements made during each year. * * * [A]nd upon a failure to comply with these conditions, the claim or mine upon which such failure occurred shall be open to relocation in the same manner as if no location of the same had ever been made, provided that the original locators, their heirs, assigns, or legal representatives, have not resumed work upon the claim after failure and before such location. [Emphasis added.]

There was no reference in the original mining law of the United States to an "amended" location. The term "amended notice of location" was used in section 1 of the Act of August 12, 1953, 30 U.S.C. § 501(a) (1976) and in section 1 of the Act of August 13, 1954, 30 U.S.C. § 521(a) (1976) relating to mining claims originally located on lands which were embraced by either a mineral lease or a mineral lease application. The term, however, was not defined. It is in no small part due to this omission that the subsequent history of mining law adjudication has been mired in a seemingly endless sea of contradictory statements.

The difficulty arose virtually immediately as a number of states passed laws which permitted amended and additional certificates of location. See Tonopah & Salt Lake Mining Co. v. Tonopah Mining Co., 125 F. 389 (C.C.D. Nev. 1903). This was necessitated by the fact that it was not unusual for the original notice of location to contain various minor defects, particularly as regards the actual physical

location of the claim. Thus as early as 1885 the Federal courts recognized the right of the mineral locator to amend his location. See McEvoy v. Hyman, 25 F. 596 (C.C.D. Colo. 1885). It is interesting to note that at this early date, the court recognized, in interpreting the Colorado statute authorizing amended locations, that "[i]t is perhaps unfortunate that the question of amending a certificate and of changing the boundaries of claim, which amounts to a relocation, should be expressed in general terms relating to both subjects, and in one section of the law." Id. at 599-600. The court continued noting that the right of correction of the certificate of location had been recognized independently of statutes expressly authorizing amendments to certificates. See also Fred B. Ortman, 52 L.D. 467, 471 (1928). Moreover, the court opined that the proviso of the statute limiting its relation back to those situations in which no intervening rights had been initiated referred to the situation where the boundaries of the claim were changed, i.e., a relocation, and not to the amendment of a certificate of location. Accord, Hagerman v. Thompson, 68 Wyo. 515, 235 P.2d 750, 756 (1951); Nichols v. Ora Tahoma Mining Co., 62 Nev. 343, 151 P.2d 615, 625 (1944). See also Brattain Contractors, Inc., 37 IBLA 233 (1978).

Similarly, in a case styled John C. Teller, 26 L.D. 484 (1898), the Department held that an amended location, permitted by Colorado State law was "made in furtherance of the original location and for

the purpose of giving additional strength or territorial effect thereto, while [a relocation] is a new and independent location which can only be made where the original location and all rights thereunder have been lost by failure to make the necessary annual expenditure." Id. at 486.

A relocation is, by the terms of the statute, adverse to the original location, being permissible only where there has been a failure by the original locator to perform assessment work. See Burke v. Southern Pacific R.R. Co., 234 U.S. 669, 693 (1914); Belk v. Meagher, 104 U.S. (14 Otto) 279, 284 (1881); State of South Dakota v. Madill, 53 I.D. 195, 200 (1930). Thus, unlike an amended location for which credit may be obtained for expenditures made on behalf of the original location (see Tam v. Story, 21 L.D. 440, 443-44 (1895)), moneys spent in the development of an original claim may not be applied to a relocated claim to fulfill the statutory requirement that $500 be expended on development prior to the issuance of patent. See Tough Nut No. 2 and Other Lode Mining Claims, 36 L.D. 9 (1907); Yankee Lode Claim, 30 L.D. 289 (1900). A critical question, and one crucial to this case, is whether and in what circumstances an amended location relates back to the date of the original location.

For the purposes of this decision, we will define an "amended" location as a location which is made in furtherance of an earlier

valid location and which may or may not take in different or additional ground. The term "relocation" will be limited to those situations in which the subsequent location is adverse to the original location. 2/

[2] It will be seen that generally an amended location relates back, where no adverse rights have intervened, to the date of the original location. See Morrison, Mining Rights, 16th ed. (1936), at 159-163. Thus, in Bunker Hill & Sullivan Mining & Concentrating Co. v. Empire State-Idaho Mining & Development Co., 134 F. 268 (1903), the Circuit Court for the District of Idaho noted: "It has long been held that a mining location may be amended without the forfeiture of any rights acquired by the original location, except such as are inconsistent with the amendment, but new rights cannot be added which are inconsistent with those acquired by other locations made between the dates of the original and the amended location." Id. at 270. Additionally, there are certain circumstances in which an amended location notice will relate back to the date of the original notice even in the face of intervening adverse claims. Thus, it has been held that if the amended notice is made to cure obvious defects in the original

2/ No attempt will be made to reconcile the terminology used herein with all prior Departmental decisions for the simple reason that they are virtually irreconcilable. See generally G. Reeves, Amendment v. Relocation, 14 Rocky Mt. Min. Law Inst. 207 (1968).

notice without including any new ground, it will relate back to the original notwithstanding intervening locations. McEvoy v. Hyman, supra; Gobert v. Butterfield, 23 Cal. App. 1, 136 P. 516 (1913); Bergquist v. West Virginia-Wyoming Copper Co., 18 Wyo. 270, 106 P. 673, 677-78 (1910).

While the Bunker Hill case notes that the amended location relates back to the extent it is not inconsistent with the intervening rights of others, it must be remembered that if the original claim was valid and was maintained in conformance with the law, the land embraced by the claim would not be open to the initiation of adverse rights (Farrell v. Lockhart, 210 U.S. 142 (1908)), and thus an amendment would of necessity relate back, provided no new land was included in the amendment. See generally Waskey v. Hammer, 223 U.S. 85 (1912); Atherley v. Bullion Monarch Uranium Co., 8 Utah 2d 362, 335 P.2d 71 (1959). No amended location is possible, however, if the original location was void. See Brown v. Gurney, 201 U.S. 184, 191 (1906). A void claim would be one in which a locator has failed to comply with a material statutory requirement. Flynn v. Vevelstad, 119 F. Supp. 93 (D. Alaska 1954), aff'd, 230 F.2d 695 (9th Cir. 1956).

There is no doubt that withdrawal of land from mineral entry constitutes such an appropriation of the land as to prevent the initiation of new rights. See Mark W. Boone, 33 IBLA 32 (1977); Lyman B.

Crunk, 68 I.D. 190, 194 (1961); James M. Wells, A-28549 (February 10, 1961); United States Phosphate Co., 43 L.D. 232 (1914). But to the extent that the amended location merely furthers rights acquired by a valid subsisting location, withdrawal of land subject to existing rights will not prevent the amended location. It should be emphasized, however, that the original claim must have been valid, and not voidable, in this situation. While it is true that a legal presumption arises in favor of a mineral claimant in possession and working the claim against the attempts of another claimant to enter upon the land and make a discovery, such presumption does not arise against the United States. Brattain Contractors, Inc., supra at 238 and cases cited. See Houck v. Jose, 72 F. Supp. 6, 10 (S.D. Cal. 1947), aff'd, 171 F.2d 211 (9th Cir. 1948). By withdrawing the land, the United States has prohibited the initiation of new claims and also prevented the curing of substantive defects in other claims. 3/

Thus, we hold that to the extent that an amended location, i.e., one made in furtherance of an original location, merely changes a notice of location without attempting to enlarge the rights appurtenant to the original location, such amended location relates back to

3/ We are aware that placer claimants have, in certain instances, been required both to obtain new land and relinquish land originally claimed in order to conform the claim to an official survey. Inasmuch as that fact situation is not presented herein, we need not determine whether, in these circumstances, the inclusion of new land operates as an exception to the general rule.

the original. Examples of such amended locations would be a change in the name of the claim (Butte Consolidated Mining Co. v. Barker, 35 Mont. 327, 89 P. 302, aff'd on rehearing, 90 P. 177 (1907); Seymour v. Fisher, 16 Colo. 188, 27 P. 240 (1891)), the exclusion of excess acreage so long as the original discovery point is preserved (see Waskey v. Hammer, supra), and a change in the record owners of a claim where such change is reflective of an existing fact (United States v. Consolidated Mines & Smelting Co., 455 F.2d 432, 441 (9th Cir. 1971); Thompson v. Spray, 72 Cal. 528, 14 P. 182 (1887)).

[3] Finally, we would point out that if an amended claim had been filed, the recording of such amended claim under section 8 of the Mining in the Parks Act, 90 Stat. 1342, 1343, 16 U.S.C. § 1907 (1976), or under section 314 of the Federal Land Policy and Management Act of 1976, 90 Stat. 2744, 2769, 43 U.S.C. § 1744 (1976), together with such other information as is required by the applicable regulations, would constitute compliance with the Federal recording requirements since the two notices must be construed together. 4/ Hagerman v. Thompson,

4/ We note that 36 CFR 9.5 requires that various documentation, including the date of amendments and relocations, be filed on or before September 28, 1977. A letter from the Assistant to the Regional Director, Rocky Mountain Region, National Park Service, to the Utah State Director, BLM, stated: "These mining claim locations were recorded * * * in accordance with the provisions of [the Mining in the Parks Act]." We will, therefore, assume for the purposes of this decision that the appellants have otherwise complied with the recordation requirements of the Mining in the Parks Act.

supra; Bergquist v. West Virginia-Wyoming Copper Co., supra; Giberson v. Tuolumne Copper Mining Co., 41 Mont. 396, 109 P. 974 (1910); Duncan v. Fulton, 15 Colo. 140, 61 P. 244 (1900).

Turning to the facts of the appeal before us, we note that the State of Utah, unlike many other Western States, does not have a specific statute permitting or regulating amended locations. The Supreme Court of Utah, however, has recognized the right of locators to amend. See Cranford v. Gibbs, 123 Utah 447, 260 P.2d 870 (1953).

The three State Office decisions involved separate groups of claims. The decision in AD 49-78 involved the Copperspur Nos. 1-42, 61-118, inclusive, situated variously in secs. 1, 11, and 12, t. 29 S., R. 16 E., Salt Lake meridian; secs. 26 and 35, T. 28 S., R. 16 E., Salt Lake meridian; sec. 31, T. 28 S., R. 17 E., Salt Lake meridian; and secs. 5, 6, and 8, T. 29 S., R. 17 E., Salt Lake meridian. The decision in AD 50-78 involved the Jean Nos. 7-26, 28-48, 61, 63, 65, 67, 69, 71, 73, 75, 77, 79, 81-100, 103-120, inclusive, all situated in T. 36 S., R. 8 E., Salt Lake meridian. The decision in AD 51-78 involved the RG Nos. 101-126, 131-166, and 183-200, inclusive, all located in T. 36 S., R. 7 E., Salt Lake meridian. Appellants aver that all of these were amended locations of prior existing claims; we will examine each group separately.

The Copperspur group was recorded on June 13, 1974. The location certificates 5/ recited that they had been located on May 20, 1974, by R. Gail Tibbetts and one George Addison. The Copperspur Nos. 1-42, and 61-84, inclusive, overlie a group of claims known as the "Orange Claim Group." The Copperspur Nos. 85-118, inclusive, overlie a group of claims identified as the "Original 'Tibbetts' Claims." 6/ The Orange Claim Group was located in May 1955, alternatively by Robert G. Park and William J. Jones. The Original "Tibbetts" Claims were located in 1951 by Fred Frazier, Harold Provonsha, and Bill Tibbetts. Bill Tibbetts was the father of the appellants. Appellants contend that all interests in these claims were verbally transferred to Bill Tibbetts, who in turn verbally transferred all of the claims, in 1969, to R. Gail Tibbetts.

The Jean group was recorded on April 2, 1974. The location certificates recited that they had been located on March 3, 1974, by R. Gail Tibbetts and the Minerals Recovery Co. These claims were apparently subsequently transferred to the Blue Eagle Mining Co., by a

5/ While we will employ the term "location" notices, we do not mean to imply that these documents were not "amended location" notices. As we will explain, infra, we do not here decide whether these were, in fact, new location notices.
6/ Because of the multiplicity of claim names, we will use the terms "Orange Claim Group" and "Original 'Tibbetts' Claims" since they were referred to as such in appellants' submissions to the Department.

mining lease and option executed in August 1977. The Jean group overlie various claims identified as the Colt Nos. 1-27, inclusive; the Circle "M" Nos. 1, 3, 5, 9, 11-17, inclusive; the Circle "X" Nos. 1-20, inclusive; the Circle "Y" Nos. 1-20, inclusive; and the Circle "Z" Nos. 1-20, inclusive. 7/ The Colt claims were located in 1966 and 1967. The various Circle claims, with the exception of the Circle "M" group, were located in 1967. R. Gail Tibbetts was co-locator of all of the claims located in 1966 and 1967. Various other parties, however, were co-locators of all of these claims as well. The Circle "M" group was apparently located by an individual named Wilcox in 1954. 8/ Moreover, it appears that the Jean Nos. 7-20, inclusive, do not merely overlie prior claims; rather, they apparently encompass various parts of individual Circle "M" claims and other parts of the Circle "X" claim Nos. 1 and 2. 9/ Appellants contend that, in 1969, through certain verbal mesne conveyances, R. Gail Tibbetts and Mineral Resources Co. acquired all the interests of the other locators. 10/

7/ Certain Jean claims overlie certain Circle "Z" claims which are not the subject of this appeal. Those Jean claims are Nos. 62, 64, 66, 68, 70, 72, 74, 76, 78, and 80.
8/ We have also been unable to find any copies of the original location notices for the Circle "M" group of claims. Additionally, there is no recitation in appellants' submissions concerning how they acquired title to these claims.
9/ See n.14, infra.
10/ See n.8, supra.

The RG group was recorded on February 20, 1975. The location certificates recited that they had been located on February 1, 1975, by Ray Tibbetts and R. Gail Tibbetts. These claims were also apparently transferred to the Blue Eagle Mining Company by a mining lease and option executed in 1977. The RG claims overlie various claims identified as the Choprock Nos. 501-549, 574-595, and 600-607, and the Chet Nos. 1 and 2. These claims were located in 1967, by differing groups of co-locators, some of which included R. Gail Tibbetts. 11/ Apparently, the Choprock Nos. 574-595 were never recorded. The RG Nos. 131-152 overlie these claims. Additionally, the Choprock No. 533 and the Chet No. 1 covered the same ground. Appellants contend that all co-locators verbally transferred their interests in these claims to them in 1969.

[4] There exist a few subsidiary issues with which we will deal prior to the examination of the main issue involved in this appeal. We noted, supra, that the Choprock Nos. 574-595, inclusive, were apparently never recorded. The applicable Utah statute provides:

> Within thirty days after the date of posting the location notice upon the claim, the locator or locators, or his or their assigns, must file for record in the

11/ Many of the location notices show that various co-locators' names had been scratched out.

> office of the county recorder of the county in which such claim is situated a substantial copy of such notice of location.

Utah Code Ann. (1953) 40-1-4.

In Atherley v. Bullion Monarch Uranium Co., supra, the Utah Supreme Court held that the failure to record a notice of relocation, therein termed an "amended location," did not work a forfeiture of the claim. The court held that "title to a mining claim is * * * initiated by discovery and segregation both of which requirements were performed in this case. An estate immediately vested and the Utah law does not provide for a forfeiture for failure to record." 335 P.2d at 74. As a result of this analysis, the court ruled that a subsequent locator, with knowledge of the original locator's related claim, could not enter the land for the purpose of establishing a mining claim thereon. The court, however, expressly noted that this rule was not applicable vis-a-vis the United States, citing Houck v. Jose, supra.

In conformity with this interpretation, we hold that while the failure to record the mining claim as required by Utah State law does not, in and of itself, render the claim invalid, the withdrawal of the premises by the United States, prior to any corrective action by the claimant, would serve to nullify the claim. 12/ The 1972 withdrawal

12/ The period of time for holding property by adverse possession under Utah law is 7 years. Utah Code Ann. 78-12-5 et seq. (1953). Therefore, appellants could not have initiated a claim under 30 U.S.C. § 38 (1976) prior to the effective date of the withdrawal. Cf. United States v. Guzman, 18 IBLA 109, 81 I.D. 685 (1974).

thereby invalidated the Choprock Nos. 574-595, inclusive. Accordingly, the RG Nos. 131-152, inclusive, which were allegedly based on the Choprock Nos. 574-595, were null and void ab initio, since they were either located when the land was withdrawn or, if deemed to be amended locations, sought to amend claims which were already void.

[5] The next question which we must consider relates to the fact that all of the transfers to appellants were verbal. Under Utah law, the right to a mining claim is an interest in real property, which may pass by deed. Lavagnino v. Uhlig, 26 Utah 1, 71 P. 1046, 1051 (1903), aff'd, 198 U.S. 443 (1905). Moreover, the Utah Supreme Court has specifically held that the statute of frauds applies to an interest in a mining claim. Woolley v. Wycoff, 2 Utah 2d 329, 273 P.2d 181, 183 (1954). The Utah statute of frauds contains a provision that certain transactions which are required by the statute to be committed to writing are void if they are not. Transfer of real estate, except by an agent, is not listed therein. See Utah Code Ann. (1953) 25-5-4. The question, therefore, is whether the failure to commit to writing an alleged transfer of a mining claim from the original locators and co-locators necessarily nullifies an amended location. We do not believe that it does.

The statute of frauds is intended for the benefit of the parties to an unwritten agreement "being designed to enable parties to certain types of transactions to escape liabilities and duties assumed orally but not in writing." Mustard v. United States, 155 F. Supp. 325, 332 (Ct. Cl. 1957). For this reason, it has been held that strangers to the agreement cannot plead the statute. Livingston v. Thornley, 74 Utah 516, 280 P. 1042, 1045 (1929). Even when the statute provides that an agreement is void, the general rule is that it is merely voidable at the option of a party to the agreement. See Ford Motor Co. v. Hotel Woodward Co., 271 F. 625, 627-28 (2d Cir. 1921).

In light of the above, we hold that the fact that transfers of mining claims are oral and not committed to writing does not, ipso facto, invalidate a subsequent amended location notice. Since the United States is essentially a stranger to the agreement, the fact that the agreement may be subject to the statute of frauds should not be used to invalidate the claim. This rule is in conformity with another well-established rule in the mining laws that the omission of a co-locator's name in an amended notice is only subject to the objection of the co-locator whose name has been omitted. 13/ Tonopah &

13/ We would note, however, that the exclusion of one of eight co-locators of an association placer claim for 160 acres, without the substitution of an additional co-locator, permits the Department to properly inquire into the existence of a discovery as of the time of the amendment. See, e.g., United States v. Harenberg, 9 IBLA 77 (1973).

Salt Lake Mining Co. v. Tonopah Mining Co., supra; Thompson v. Spray, supra. We also hold, however, that the failure to commit a transfer of a mining claim to writing does give rise to a question of fact into which the Department may properly inquire.

[6] Thus, we reach the question which is essential to this appeal: were the actions variously taken in 1974 and 1975 in the nature of "amended" notices of location, or were they relocations made after the land had been withdrawn?

The decision of the State Office noted that nothing on the face of the notices for the Copperspur, Jean, and RG claims indicated that these were amended notices or even relocations. This is true. There is no absolute requirement, however, that an amended location or a relocation state that this is its purpose on its face.

The general rule is that an "amended" certificate need not state the specific purpose of the amendment. See Tonopah & Salt Lake Mining Co. v. Tonopah Mining Co., supra at 397; Johnson v. Young, 18 Colo. 625, 34 P. 173 (1893); Lindley on Mines (1897) at § 398. We have been unable, however, to discover any court case dealing with an alleged amended certificate or location in which the documents do not, on their face, indicate that they are amended or additional location notices. We feel that while this omission does not inevitably lead to

the conclusion that no amended location was intended, it does properly give rise to an inference that such was not the intent. See The Heirs of M. K. Harris, 42 IBLA 44 (1979).

In United States v. Consolidated Mines & Smelting Co., supra, the Ninth Circuit Court of Appeals noted that the appellant:

> [C]laimed that some of its location notices were actually relocation notices. This contention was dismissed by the Department with the observation that relocation is necessarily adverse to the interests of prior locators. Thus, the Department concluded, Consolidated's rights in its mining claims must date from the "relocation" notices filed after the withdrawal. This generalization is correct only if the relocator claims against, rather than through, the prior locator. If a relocator claims through the prior locator, ordinarily the relocation notice relates back. * * * The evidence before the Department did not indicate whether Consolidated claimed through or against its predecessors. Thus the Department's generalization is supported only by an unjustifiable assumption of fact. Accepting arguendo Consolidated's status as a relocator, hearings would have been desirable to ascertain the relationship between Consolidated's relocations and prior location made by persons through whom Consolidated claimed.
>
> Given a disputed issue of fact, hearings were required before the Department could declare Consolidated's claims null and void. [Emphasis supplied.]

455 F.2d 432, at 441.

We believe that this precedent is applicable herein. A number of problems have been delineated above. First, there is a question whether appellants obtained title to the mining claims prior to the 1974 locations. Second, there is a question whether the 1974 actions were intended to be amendments of the prior location, relocations, or new locations. These matters are best determined at a hearing.

We also note that appellants contend that they relied on the advice of a National Park Service employee, one Harold Ellingson, in their actions, particularly in the recordation of the claims. It is axiomatic that regardless of the validity of the 1974 locations, nothing in the decision below adversely affected the prior locations. However, since these prior locations were not recorded, they would now be void under section 8 of the Mining in the Parks Act, 90 Stat. 1343, 16 U.S.C. § 1907 (1976).

The circumstances in which estoppel will lie against the Government are of a very limited nature. We do not now decide whether, if it could be proved that appellants were misled as to which claims should be recorded, estoppel would lie herein. It is sufficient to note that inasmuch as we are referring the matter to the Hearings Division for the assignment of an Administrative Law Judge, the hearing should include an inquiry into this question, so that we may resolve any future question without substantial factual uncertainties.

Insofar as the testimony of Ellingson would be critical to such determinations, we request that provision be made for his appearance.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decisions appealed from are affirmed as regards the RG Nos. 131-152, and set aside as to all other claims, and the case files for such claims are hereby referred to the Hearings Division for the assignment of an Administrative Law Judge who will conduct a hearing inquiring into the matters set out in the text. 14/ The appellants will have the burden

14/ In addition, we noted in the text that Jean Nos. 7-20, embrace parts of various prior claims. This raises a difficult factual problem. If it was intended that the Jean location notices for those claims serve as amended notices of location, they constitute, in effect, attempts to acquire new land vis-a-vis the earlier locations. As an example, let us assume that original claims A and B, each embrace 80 acres, consisting respectively of the E 1/2 NW 1/4 for claim A, and the W 1/2 NW 1/4 for claim B, are amended to read the N 1/2 NW 1/4 for claim A, and the S 1/2 NW 1/4 for claim B. The inclusion in claim A of the NW 1/4 NW 1/4 and the inclusion in claim B of the SE 1/4 NW 1/4 entails the acquisition of new land to those two claims. Such inclusion is impermissible in the face of an intervening withdrawal of land. Thus, in our example, the NW 1/4 NW 1/4 of claim A and the SE 1/4 NW 1/4 of claim B would be null and void ab initio. Moreover, if the only point of discovery in claim A had been located in the SE 1/4 NW 1/4 the exclusion of the discovery point would also invalidate the NE 1/4 NW 1/4. See Waskey v. Hammer, supra. The record before us is inadequate to make the factual determinations necessary to determine which portions, if any, of the Jeans Nos. 7-20 may be valid. We therefore request that the appellants present evidence on this point and that the Administrative Law Judge determine this question initially.

of showing that the 1974 and 1975 location notices were amended locations rather than new locations or relocations. The Judge will issue an initial decision which may be appealed by any party adversely affected.

James L. Burski
Administrative Judge

I concur:

Douglas E. Henriques
Administrative Judge

ADMINISTRATIVE JUDGE GOSS CONCURRING:

I concur in the majority analysis, except in two respects.

I submit that the inference to be drawn from failure to designate an alleged amended location notice as "amended" should be more limited. The inference that there was no intent to "relocate" rather than to amend should apply only (1) where the locators on the new document are not the same or successors to those on the prior document, or (2) where there has been a lapse in required assessment work. If the parties are not in privity, an adversary relationship can be presumed, at least to the extent of the differences. If assessment work is not performed, an abandonment by the locator and a "relocation" is a possibility.

While I concur that the specified BLM decision should be set aside, I would remand to BLM, rather than to the Hearings Division, for further proceedings. The contemplated hearing could prove costly, time-consuming, and possibly unnecessary. Appellants have not applied for the 261 patents and application may never be made. BLM is burdened with the implementation of the Federal Land Policy and Management Act of 1976, 43 U.S.C. §§ 1701-82 (1976) and other matters.

Therefore, in the interest of administrative convenience and economy, BLM should be given authority to chart its course. The Board should rule that the claims are not to be declared void ab initio without the hearing specified. Among the options available to BLM would be the following: (1) the scheduling of the withdrawal hearing; (2) recognition of the later locations as amended locations of claims prior to the withdrawal; (3) reservation of the question of validity of the later locations as amendments until a later time or until the question is precipitated as to a particular claim by an application for patent; and (4) review of the claims to determine whether any content should be brought and to determine whether such a contest could be any less burdensome than the hearing on the withdrawal. 1/

Joseph W. Goss
Administrative Judge

1/ While I do not mean to imply a contest would be appropriate, neither should a contest prior to a withdrawal hearing be precluded by the Board. One question concerns the 99 claims in the Copperspur group, which appellants state were located on May 20, 1974; a preliminary inquiry on this matter would seem appropriate. See United States v. Zweifel, 11 IBLA 53, 80 I.D. 323 (1973), sustained sub nom. Roberts v. Morton, 549 F.2d 158 (10th Cir. 1977), cert. denied sub nom. Roberts v. Andrus, 434 U.S. 834 (1977).